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No. 91-1943

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1991

BRUNNER & LAY, INC., ROBERT M. WILKINSON, AND BOBBY AND GEORGIA MCLAUGHLIN, on behalf of themselves and all other similarly situated taxpayers,

Petitioners,

v.

JIM C. PLEDGER, COMMISSIONER OF REVENUES; JIMMIE LOU FISHER, TREASURER OF THE STATE OF ARKANSAS; JOAN R. PERRY, TREASURER OF WASHINGTON COUNTY; AND CHARLES A. JOHNSON, COUNTY JUDGE OF WASHINGTON COUNTY, ARKANSAS

Respondents.

Petition for a Writ Of Certiorari to the Supreme Court of Arkansas

REPLY BRIEF FOR THE PETITIONERS

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REPLY BRIEF FOR THE PETITIONERS

Respondents make essentially three points in their effort to dissuade this Court from reviewing, or summarily reversing, the decision below. First, they argue that Arkansas' taxing scheme is not facially discriminatory -- even though it explicitly accords preferential tax treatment to property with a previous Arkansas connection -- on the ground that facial discrimination exists only when there is discrimination based on residence, situs, or source. Second, they contend that Arkansas' taxing scheme does not discriminate in effect against interstate commerce -- despite the fact

that used property purchased in Arkansas will more likely have borne a previous Arkansas tax than used property purchased elsewhere -- on the ground that the record fails to support this self-evident proposition. Third, they contend that the case lacks national significance because some of the analogous discriminatory taxing schemes that Petitioners have identified are not identical to Arkansas'. As we demonstrate below, none of these assertions can withstand scrutiny.

I. ARKANSAS' TAXING SCHEME IS FACIALLY DISCRIMINATORY, REGARDLESS OF WHETHER IT DISCRIMINATES ON THE BASIS OF RESIDENCE, SITUS, OR SOURCE

It is indisputable that Arkansas' taxing scheme discriminates on its face against property that lacks a prior connection with Arkansas. The statute by its terms exempts the sale or use of a used car, airplane or mobile home from tax if, but only if, *Arkansas* has taxed an earlier sale or use of the property. Pet. 3-4. Thus, the *only* distinction drawn by the statute between taxable and tax-exempt property is whether the property has a prior connection with Arkansas. Respondents do not -- and could not -- contend otherwise.

Respondents nevertheless claim that such an explicit preference for property with an Arkansas lineage can pass constitutional muster because it does not discriminate on the basis of the residence of the buyer or seller, the situs of the transaction, or the source of the goods. Br. Opp. 3-4. Respondents' claim is frivolous. There is nothing in the Court's long-standing prohibition against taxes that discriminate on their face against interstate commerce to suggest that the prohibition is limited to any particular type of discrimination. To the contrary, the Court's decisions condemn facial discrimination against interstate commerce in any manner, shape, or form. *See, e.g., Best & Co. v. Maxwell*, 311 U.S. 454, 455 (1940) ("[t]he commerce clause forbids discrimination, whether forthright or ingenious").

Indeed, the Court has routinely invalidated as facially discriminatory state taxing schemes like Arkansas', which exempted or favored transactions with local ties, without regard to considerations of residence, situs, or source. *See, e.g., Tyler Pipe Indus., Inc. v. Washington State Dep't of Rev.*, 483 U.S. 232 (1987); *Armco, Inc. v. Hardesty*, 467 U.S. 638 (1984); *Boston Stock Exchange v. State Tax Comm'n*, 429 U.S. 318 (1977). In *Armco*, for example, the Court struck down West Virginia's wholesaling tax which exempted transactions that had already been subjected to that state's manufacturing tax. The Court held that the Commerce Clause barred the state from according tax preferences to transactions based on whether they had been subjected to a prior levy on in-state activity. For the same reason, Arkansas may not favor transactions involving used property based on whether the property has been the subject of a prior levy on in-state activity. In both *Armco* and in this case, the taxing scheme "forecloses tax-neutral decisions" (*Boston Stock Exchange*, 429 U.S. at 331) and exerts an "inexorable hydraulic pressure" (*American Trucking Associations, Inc. v. Scheiner*, 483 U.S. 266, 286 (1987)) on taxpayers to limit their activities to one state in order to minimize their state tax burden. Whether the discrimination is based on residence, situs, source or some other factor is beside the point.

Even if there were a requirement that facial discrimination must be based on residence, situs, or source, Arkansas' levy would satisfy such a requirement. The only used cars, airplanes, or mobile homes that are subject to tax under Arkansas' scheme are those that have not previously been sold or used in Arkansas and, accordingly, such property is properly viewed as having an out-of-state source. On the other hand, used cars, airplanes, or mobile homes that have an Arkansas source, because they were once sold or used in Arkansas, are exempt. Hence Arkansas' taxing scheme is facially discriminatory on the basis of source.

Respondents' assertion that "[p]revious decisions of this Court establish that neither the past commercial history nor the post-sale destination of goods is relevant in determining whether a sales or use tax on sales of those goods is a burden on interstate commerce"

(Br. Opp. 4-5 (footnotes omitted)) likewise lacks substance. In fact, the very first decision of this Court striking down a state tax on the ground that it discriminated against interstate commerce turned on the fact that the tax burdened goods based on their "past commercial history." *Welton v. Missouri*, 91 U.S. 275 (1876) (invalidating a license tax applicable only to goods with "past commercial history" in other states); *see also Bacchus Imports, Ltd. v. Dias*, 468 U.S. 263 (1984); *Chemical Waste Management, Inc. v. Hunt*, 60 U.S.L.W. 4433 (U.S., June 1, 1992). Respondents' citation of *McGoldrick v. Berwind-White Coal Mining Co.*, 309 U.S. 33 (1940) and *Commonwealth Edison Co. v. Montana*, 453 U.S. 609 (1981) (Br. Opp. 4) in support of their position reveals the weakness of their claim. Those cases merely held that a *nondiscriminatory* tax, which applied equally to all goods regardless of their origin or destination, was not rendered constitutionally suspect because it applied to goods shipped into or out of the state. The cases hardly support the proposition that a taxing scheme like Arkansas', which explicitly makes tax liability turn on the property's prior in-state connection, can survive constitutional scrutiny.

II. THE RECORD FULLY SUPPORTS PETITIONERS' CLAIM THAT ARKANSAS' TAXING SCHEME DISCRIMINATES IN PRACTICAL EFFECT AGAINST INTERSTATE COMMERCE

Petitioners' "practical effect" argument rests on the self-evident proposition that used cars, airplanes, or mobile homes that are sold in Arkansas will more likely have borne a prior Arkansas sales or use tax than used cars, airplanes, or mobile homes that are sold in other states.[1] Consequently, the practical effect of exempting property that has previously borne an Arkansas sales or use tax is to favor Arkansas sales over out-of-state sales.

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[1]The trial court in substance so found (App. B 25a), and the Arkansas Supreme Court did not reverse on this point. App. A 15a-16a; see also Pet. 6.

Respondents' principal response to this claim is that the record allegedly fails to support it. They argue that Petitioners have not proven that used property purchased in Arkansas is more likely to have borne a previous Arkansas sales or use tax than used property purchased elsewhere. Br. Opp. 5-6. Respondents' position wholly misconceives the import of this Court's decisions invalidating taxes based on their discriminatory practical effect. These decisions turn not on voluminous records documenting the precise impact of a tax but rather on the "inherent character of the tax" (*Nippert v. Richmond*, 327 U.S. 416, 432 (1944)) and the "strong likelihood" that the tax will "bear with undue burden upon commerce that crosses state lines" thereby making "equality of application between [interstate and intrastate] commerce, generally speaking, impossible." *Id.*

Indeed, the record in this case is indistinguishable from the records in the numerous cases in which the Court has struck down taxes on the ground that they discriminate in effect against interstate commerce. For example, in *Nippert*, whose record Respondents cite with approval, Br. Opp. 6, the only facts before the Court were those relating to the activities of Ms. Nippert and other solicitors of the American Garment Company, 327 U.S. at 419-20, along with the statute that taxed itinerant merchants like Ms. Nippert, but not merchants with permanent locations in the city. Here the facts before the Court are those relating to Petitioners' out-of-state purchases of used property, Pet. 4-5, along with the statute that taxes purchasers like Petitioners, but not purchasers of property with a prior Arkansas connection. In each case, the record is more than sufficient for the Court to conclude, as it did in *Nippert*, that, while the tax may strike "as heavily" upon some local transactions as it does upon out-of-state transactions, "the strong likelihood is the other way." 327 U.S. at 432. *See also Real Silk Hosiery Mills v. Portland*, 268 U.S. 325 (1925); *Robbins v. Shelby County Taxing*

District, 120 U.S. 489 (1887).[2] In short, "[w]e need not know how unequal the Tax is before concluding that it unconstitutionally discriminates." *Maryland v. Louisiana*, 451 U.S. 725, 760 (1981).[3]

Respondents further contend that the record in this case is distinguishable from the record in *Halliburton Oil Well Cementing Co. v. Reily*, 374 U.S. 858 (1963), which struck down a Louisiana tax on out-of-state but not in-state "isolated" sales of property for use in Louisiana. Br. Opp. 8. The purported distinction between *Halliburton* and this case is that the record in this case shows that Arkansas' scheme avoids "sequential taxation" whereas the record in *Halliburton* did not. In support of this thesis, Respondents point to the Court's observation in *Halliburton* that Louisiana "maintains that the taxes here in question could have been reduced by any...previous taxation" and that "[i]f the record supported the...position, it would be carefully considered." 373 U.S. at 858 n.8. "Such a record," Respondents contend, "exists in this case." Br. Opp. 8.

Respondents' effort to distinguish *Halliburton* on this ground reveals not only a misunderstanding of the argument in *Halliburton* but also a failure to comprehend the defect in Arkansas' flawed attempt to prevent "sequential taxation." In *Halliburton*, Louisiana

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[2]In both *Real Silk Hosiery* and *Robbins*, which struck down facially neutral taxes on "drummers" on the ground that they discriminated in practical effect against interstate commerce, the only facts before the Court were those relating to the taxpayer's activities, 268 U.S. at 334-35; 120 U.S. at 491-92, along with the statutes that subjected these activities to tax.

[3]Respondents' reliance on *Amerada Hess v. Director, Division of Taxation*, 490 U.S. 66, 78 n.10 (1989), Br. Opp. 6-7, for the proposition that "a deduction denial does not unduly burden interstate commerce just because the deduction denied relates to an economic activity performed outside the taxing state" is misplaced. In the very passage quoted by Respondents, the Court made it clear that this principle had no application when a statute is "directed specifically at economic activity that occurs only in a particular location." 490 U.S. at 78 n.10. That, of course, is the case here, where the statute exempts property from tax because of "economic activity that occurs only in a particular location," namely, the prior sale or use of the property in Arkansas.

defended its isolated sales exemption with the following argument:

> [A]ll property sold at isolated sales within the state has already been the subject of a two percent (2%) tax, either sales or use, upon its first sale at retail, or upon its first use. *Further, the State of Louisiana provides a tax credit where the property in question has already been the subject of a similar tax outside the state*. If appellant had shown that the property in question had been subject to a similar tax, the State would not have claimed further tax. Here there is perfect equality of treatment.

Brief for Appellee at 22, *Halliburton* (emphasis supplied). Louisiana thus argued that it would have allowed the taxpayer to claim a credit for taxes previously paid to *other* states. It was this argument that the Court said it would have "carefully considered" if the argument had enjoyed support in the record. The Court observed however, that the record in *Halliburton* contradicted Louisiana's argument. 373 U.S. at 858 n.8. Similarly, the record in this case reflects the undisputed fact that Arkansas' scheme does *not* allow a credit or exemption against its tax on the sale of used property for taxes imposed by *other* states on previous transactions. Thus, Respondents' attempt to distinguish *Halliburton* based upon its record must fail.

Respondents have also failed to apprehend that Arkansas' tax scheme is designed to eliminate "sequential taxation" only if *Arkansas* imposed a tax on a previous transaction. Arkansas' tax scheme insures that goods moving within Arkansas in intrastate commerce will be taxed only once, thus eliminating "sequential taxation," but exposes goods moving between Arkansas and other states in interstate commerce to such "sequential taxation." Rather than creating equality between local and out-of-state purchases, Arkansas' statutes have the forbidden effect of "favor[ing] local users who wish to dispose of equipment over out-of-state users similarly situated." *Halliburton*, 373 U.S. at 64.

Finally, Respondents' suggestion that Arkansas' selective

effort to avoid "sequential taxation" can pass muster under the Court's "internal consistency" doctrine (Br. Opp. 9) is without merit.[4] Respondents do not deny that if every state adopted Arkansas' taxing scheme and exempted used property from sales or use tax only if it had previously been taxed in the taxing state, then used property that never crossed state lines would be taxed only once whereas used property purchased in one state for use in another would frequently bear a double tax burden. This would appear to be a paradigmatic violation of the "internal consistency" requirement that "'the [tax] must be such that, if applied by every jurisdiction,' there would be no impermissible interference with free trade." *Armco*, 467 U.S. at 644 (quoting *Container Corp. of America v. Franchise Tax Bd.*, 463 U.S. 159, 169 (1983)).

Respondents nevertheless argue that so long as "a particular transaction is not taxed more than once,...the tax is internally consistent." Br. Op. 9. Respondents' interpretation of the "internal consistency" requirement flies in the face of its underlying purpose and the Court's cases applying it. A taxing scheme, if applied by every state, can discriminate just as effectively against interstate commerce by favoring related intrastate transactions over similar interstate transactions as by taxing a particular interstate transaction more than once. Indeed, if the Court were to artificially confine the application of the "internal consistency" doctrine to taxes imposed on a single transaction without regard to related transactions involving the same property, it would be wholly foreign to the Court's modern Commerce Clause jurisprudence, which looks to "the practical effect of a challenged tax," *Mobil Oil Corp. v. Commissioner of Taxes*, 445 U.S. 425, 443 (1980), and to "economic realities," *Complete Auto Transit, Inc. v. Brady*, 430 U.S. 274, 279 (1977).

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[4]Respondents' assertion that the "internal consistency" doctrine relates only to the question of fair apportionment and not to the question of discrimination is false. *See, e.g., Armco*, 467 U.S. at 644 ("internal consistency" rule "applies where the allegation is that a tax on its face discriminates against interstate commerce"); *American Trucking Associations*, 483 U.S. at 284 (applying "internal consistency" test to determine whether facially neutral tax discriminates against interstate commerce).

Moreover, the Court's decisions applying the "internal consistency" doctrine plainly look at related transactions in determining whether a taxing scheme discriminates against interstate commerce. In both *Armco* and *Tyler Pipe*, the Court examined a tax on two separate but related activities -- manufacturing and wholesaling -- in determining whether West Virginia's and Washington's taxing schemes violated the "internal consistency" requirement. The Court observed in those cases that the taxing schemes insured that a single tax burden would be imposed upon these two separate activities only if they were performed in the same state, but would expose such activities to a double tax burden if they were performed in more than one state. *Armco*, 467 U.S at 644;[5] *Tyler Pipe*, 483 U.S. at 246-47.[6] The taxes therefore offended the "internal consistency" requirement. *Armco*, 467 U.S. at 644-45; *Tyler Pipe*, 483 U.S. at 247-48. As we have already noted, precisely the same reasoning applies to invalidate Arkansas' tax scheme which insures that a single tax burden will be imposed if property is purchased new and resold in the same state, but exposes such events to a double tax burden if these events cross state lines.

III. RESPONDENTS' EFFORTS TO BELITTLE THE PRACTICAL SIGNIFICANCE OF THIS CASE LACK SUBSTANCE

Respondents contend that this case lacks national significance

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[5] [W]hen the two taxes are considered together, discrimination against interstate commerce persists. If Ohio or any of the 48 States imposes a like tax on its manufacturers -- which they have every right to do -- then Armco and others from out of State will pay both a manufacturing tax and a wholesale tax while sellers resident in West Virginia will pay only the manufacturing tax.

Armco, 467 U.S. at 644.

[6] The parallel condition precedent for a valid multiple activities exemption eliminating exposure to the burden of multiple tax on manufacturing and wholesaling would provide a credit against Washington tax liability for wholesale taxes paid by local manufacturers to any State, not just Washington. The multiple activities exemption only operates to impose a unified tax eliminating the risk of multiple taxation when the acts of manufacturing and wholesaling are both carried out within the State.

Tyler Pipe, 483 U.S. at 246.

for two reasons. First, they claim that the decision below does not represent a departure from this Court's Commerce Clause doctrine. Br. Opp. 9-11. We have adequately refuted this assertion above and in our petition and need not reiterate it here. Second, Respondents seek to dismiss the relevance of other discriminatory state regimes Petitioners have identified on the ground that they are not identical to Arkansas'. Br. Op. 10-11. In fact, Respondents concede that three of the taxes are "nearly identical to Arkansas'." Br. Opp. 10. Moreover, while there are variations on the precise scope of the discrimination embodied in the other statutes identified by Petitioners, each and every one of them shares the critical feature displayed by Arkansas' tax: they foreclose tax-neutral decisionmaking by favoring in-state over out-of-state economic activity. The continuing threat that these taxing regimes pose to our national economic union compel this Court's intervention to ensure that the free trade purposes underlying the Commerce Clause are faithfully protected.

CONCLUSION

The Court should issue a writ of certiorari to review the judgment of the Arkansas Supreme Court or, in the alternative, to reverse summarily the Arkansas Supreme Court's judgment.

Respectfully submitted,

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